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No. 73-319

In the Supreme Court of the United States

OCTOBER TERM, 1973

LARRY E. CLARK AND J. ELLIOTT KNOLL,
PETITIONERS

v.

UNITED BANK OF DENVER NATIONAL ASSOCIATION,
UNITED BANKS OF COLORADO, INC., AND
UNITED BANK OF FORT COLLINS
NATIONAL ASSOCIATION,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Larry E. Clark and J. Elliott Knoll pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Colorado refused to make conclusions of law or to issue an opinion. Its judgment of April 15, 1972 appears as Appendix A, *infra*, pp. 18-19. The opinion of the Court of Appeals for the Tenth Circuit, not yet reported, entered on May 22, 1973. It appears as Appendix B, *infra*, pp. 20-32.

JURISDICTION

This Supreme Court has jurisdiction of the final judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners limit their request for review by certiorari to the following questions:

First. Whether the District Court could grant summary judgment for defendants in this action for violation of the federal antitrust laws; and, further, whether the Court of Appeals could and did make proper findings of facts or conclusions of law for the first time on appeal under the antitrust laws and Rule 56 of the Rules of Procedure.

Second. Whether the Court of Appeals, affirming the District Court's summary relief for Respondents without benefit of opinion or conclusion of law by that court, applied a correct standard of law in declaring lawful an horizontal integration of commercial banking effected by means of a concerted refusal to deal and by means of an attempt to monopolize.

STATUTES INVOLVED

This Supreme Court is called upon to interpret Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1 & 2, and also whether under the cir-

cumstances of this case relief should have been granted by way of summary judgment pursuant to Fed. R. Civ. P. Rule 56. These statutes are made a part of this petition as Appendix C, *infra*, pp. 33-35.

STATEMENT OF THE CASE

This case is about the manner in which a bank holding company took control of one additional bank which Petitioners were themselves attempting to acquire by financing through another bank owned by that holding company.

Jurisdiction of the District Court. Petitioners' amended complaint alleged violations of the federal antitrust laws. The District Court had jurisdiction of the complaint pursuant to 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. § 15.

Petitioners' attempt to buy a bank. The controversy arose from the attempts of Petitioners Larry E. Clark and J. Elliott Knoll (Clark and Knoll) to buy a controlling interest in the stock of the Poudre Valley National Bank (the Poudre Bank), a national bank in the City of Fort Collins, Colorado.[1]

[1] After its acquisition by the holding company the Poudre Bank was renamed United Bank of Fort Collins National Association. Because the ownership of a majority of its stock might be affected by the suit it was made a nominal party. It never actually participated in the suit nor the appeal.

In February of 1967 Petitioners Clark and Knoll learned that this bank might be for sale.

They consulted brokers, the local office of the Comptroller of the Currency and others about the feasibility of purchasing it. They then sought financing to enable them to obtain a majority of the stock of the Poudre Bank.

Petitioners' quest for a loan from Respondents. Petitioners approached Respondent United Bank of Denver National Association (United Bank of Denver), one of a number of banks owned and controlled by Respondent United Banks of Colorado, Inc. (the Holding Company, or the parent United of Colorado), a national bank holding company.

Clark and Knoll spoke with a loan officer of United Bank of Denver. He, for his bank, investigated Clark and Knoll's requested loan, their financial means and the like. The investigation indicated that the proposal of Petitioners would be quite successful.

In spite of this, a memorandum of the investigation warned that a factor paramount in granting or denying anyone a loan to buy the Poudre Bank was whether the parent holding company United of Colorado itself wished to acquire the Poudre Bank or some other bank in the market. That interest of

the parent holding company was not disclosed to Clark and Knoll until the end, nearly one year later.

Through May, June, July and August of 1967 Petitioners Clark and Knoll were repeatedly called back to United Bank of Denver to discuss the possible loan for the purchase of the Poudre Bank. Various conditions were added, but the financing they sought was never consummated.

The negotations without Petitioners' knowledge. A director of the parent Holding Company, United of Colorado, had begun working with Petitioners Clark and Knoll to assist them in acquiring the Poudre Bank. But when the president of United Bank of Denver (who was also chairman of the board of the parent holding company United of Colorado) heard of this, he did not hesitate. He immediately warned the director that the parent United of Colorado wanted to acquire the Poudre Bank, so that the director should stay out of it. He even threatened the director with the loss of his different positions under the holding company.

Petitioners Clark and Knoll learned of this, and they confronted Respondents to learn whether the parent holding company United of Colorado was attempting to acquire the Poudre Bank for itself or whether it was negotiatng with them in good faith

with respect to a loan to them.

Respondents denied any interest in acquiring the Poudre Bank.

It is not disputed that such an interest existed as early as September of 1967.

This interest of the parent holding company, United of Colorado, was never disclosed to Clark and Knoll until March of 1968.

End of the deception. Petitioners Clark and Knoll then learned that Respondent United Bank of Colorado would not loan them funds to acquire the Poudre Bank.

The Poudre Bank was brought by the parent holding Company United of Colorado in March of 1968.

Petitioners were told of the acquisition.

The two markets. Documents submitted by Respondents themselves indicated that even at the time of hearing the parent holding company United of Colorado and its various subsidiary banks held 21.2% of all banking deposits in Colorado. There is also evidence, admittedly disputed, that United Bank of Denver was one of only two commercial banks within the State of Colorado which could supply a loan in the amount necessary to acquire the Poudre Bank.

It was undisputed that the Poudre Bank had

thirty-five percent of all deposits in the City of Fort Collins.

Damages. Upon these facts Petitioners brought suit under the antitrust laws for total damages, as trebled, in the amount of $6,362,805.

Decision of the District Court. The District Court entered judgment against Petitioners Clark and Knoll upon Respondents' motion for summary judgment with respect to the antitrust claim. On its own motion, it also dismissed the antitrust claim for failure to state a cause upon which relief could be granted.[2] It declined to give reasons for its decision.

Findings of fact of the Court of Appeals. The District Court had refused to render an opinion or make conclusions of law.

The Court of Appeals for the first time rendered an opinion discussing the issues of the case.

With respect to Petitioners' allegations of illegal tying of the loan to the requirement of an interest-free offsetting deposit in the United Bank of Denver, it held that, based on depositions and exhibits, Petitioners failed to demonstrate Respondents' requisite market power over the tying pro-

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[2] Respondents never asked the Court of Appeals to affirm on that ground, and the subject was never mentioned in the opinion of that Court.

duct. It also held that an actual tying agreement had not been consummated.[3] With respect to Petitioners' claims of an unlawful refusal to deal, it sifted the evidence on summary judgment and resolved the disputed evidence by finding that the refusal to deal was based on business considerations and not unlawful motives. Finally, the Court of Appeals held that there was no showing of an attempt to monopolize in spite of the disputed facts.

The Court of Appeals discarded Petitioners' protests that summary judgment ought not to have been granted in the antitrust case, saying that summary judgment was proper because of "the extensive depositions and deposition exhibits" which which might have been relied upon by the District Court.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that by undertaking to sift disputed evidence to sustain a district court's grant of summary judgment in an antitrust case, the Court of Appeals has decided a question of federal antitrust law and of procedure in a way sharply in conflict with the applicable

[3] It also relied in part upon the Bank Holding Company Amendments of 1970, even though Petitioners' cause of action arose in March of 1968 or earlier.

decisions of this Court. Moreover, in making conclusions of law for the first time on appeal, the Court of Appeals has decided questions of antitrust law concerning horizontal integration of banking in a way in conflict with decisions of this Court. It may have thereby decided important questions of antitrust law which have not yet been, but ought to be, decided by this Court.

1. This Court and the several courts of appeals have oft condemned summary judgment for defendants in an antitrust action. *E.g., Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969); *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Austin v. House of Vision, Inc.*, 385 F. 2d 171 (7th Cir. 1967); *Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F. 2d 225, 227 (9th Cir. 1966); *Alles Corp. v. Senco Products, Inc.*, 329 F. 2d 567, 572 (6th Cir. 1964).

Fortner and *Poller* particularly condemn the use of summary procedures where motive and intent are important in complex litigation. They condemn the kind of trial by affidavit that occured in this case.

But the result here was even more prejudical to Plaintiffs.

The District Court granted summary judgment, and even dismissed Petitioners' complaint of its own motion, without giving any reasons for doing so. So Petitioners had no opportunity to amend their complaint to comply with the law as the District Court saw it, nor an opportunity to supply any factual material that court thought lacking by way of a request for reconsideration, nor even a chance to adequately brief and present the case to the Court of Appeals since Petitioners could only guess as to why summary judgment might be sustained.

This also cast a heavy burden upon the Court of Appeals.[4]

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[4] Above and beyond the disfavor with which appellate courts have treated summary judgment for defendants in antitrust cases, *supra*, p. 9, such judgments have been particularly condemned when made without opinion. An opinion might have framed the issues for a court of appeals and then for this Court. *Cf. United States v. Falstaff Brewing Corp.*, U.S. , 93 S.Ct. 1096, 1108 n. 4 (1973) (concurring opinion of Mr. Justice Marshall); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 663 (1964) (concurring opinion of Mr. Justice Harlan); *Doglow v. Anderson*, 438 F. 2d 825, 829 (2d Cir. 1971).

The Court of Appeals was compelled to search the record to determine if there were disputed issues of material fact. In doing so, Petitioners submit, it could not but overlook facts actually sharply disputed.

For example, the Court of Appeals:

(a) determined as a matter of law that Petitioners failed to demonstrate requisite market power over the tying product, (*infra*, p. 25), when in fact Respondent United Bank of Denver admitted it could loan $2,500,000[5] and it was a matter of disputed fact whether it was one of only two or one of only one commercial banks in the relevant market which had the power to do so;

(b) determined that "the evidence is entirely lacking to show even that loan negotiations ever reached the point of a formal written application." (*infra*, p.26), when in fact Petitioners submitted innumerable documents of record seeking the loan;

(c) determined that there was nothing of record "which would indicate the refusal [to make a loan] by United was prompted by any

[5] Compared with loans of $2,000,000 as the tying product in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 497 (1969).

other reason [than a valid business reason]." (*infra*, p.27), when in fact Petitioners showed that United Bank of Denver's own loan officer made potential entry of the Fort Collins, Colorado market a factor in making the determination on the loan, and in fact its president and the chairman of the board of its holding company threatened to fire a director for interfering with its own attempts to acquire the Poudre Bank;

(d) determined that there was no evidence "to even infer a monopoly position" with respect to loans of $2,500,000, (*infra*, p.27), when in fact Petitioners had shown that only two banks in the state could make such a loan, and the other one was hardly likely to do so because it itself was seeking to acquire the Poudre Bank;

(e) determined that there was nothing from which to infer that in denying the loan United Bank of Denver wished to further monopolize the relevant market, (*ibid.*), when in fact it was shown that the Bank's director admitted against interest to Petitioners that he had been threatened not to aid Petitioners in their attempt to secure the Poudre Bank since Respondents themselves were seeking to acquire it;

(f) determined that there was no way Respon-

dents as potential market entrants could enter the Fort Collins, Colorado market (*infra*, p.27), when in fact Petitioners established that there was a smaller bank for sale at the same time the existence of which is recognized by the Court of Appeals' own opinion (*infra*, p.28); and

(g) determined that the Respondents could not enter the Fort Collins market by establishing a bank *de novo*, when that determination was based solely upon a remark of the Board of Governors of the Federal Reserve Board, on an issue not before them, in a case to which Petitioners were not parties.[6]

All these factual determinations,[7] contrary to the disputed and undisputed evidence of record, were forced upon the Court of Appeals by the improper rendition of summary judgment and judgment dismissing the complaint by the District Court on its own motion. Aside from a few isolated instances when a plaintiff attempted to test a novel new theory, such as accusing a state government of being mono-

[6] See footnote 9, *infra*.

[7] Petitioners apoligize to the Supreme Court for recounting these issues of fact. But it is necessary to understand just how disputed are the issues of fact, so that summary procedure could never be proper for resolution of the antitrust issues of this case. See fn. 4, *supra*, p.10.

polistic, *in the past decade no federal appeals court has ever really sustained summary judgment for an antitrust defendant. When a court of appeals has done so, this Court has uniformly granted certiorari and reversed.*

Petitioners respectfully submit that, as in so many cases reviewed by this Court, summary judgment for the defendants in the trial court in this antitrust case was improper and is cause for summary remand.

2. The courts below went farther than the impermissible summary judgment in favor of Respondents.

The only opinion is that of the Court of Appeals. That opinion imposes upon Petitioner a standard of proof far beyond that required by existing decisions of this Court. It makes it mandatory for a plaintiff alleging an unlawful joint refusal to deal to show some sort of direct admission that the purpose was specifically to further a monopoly.[8]

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[8] No such extreme of proof is required in demonstrating the illegality of a joint refusal to deal. A typical refusal to deal case is *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), where an independant prospect offered financial assistance but retracted it after a warning by defendants, 368 U.S. at 472, and where the obvious purpose and effect was known to the defendants, 368 U.S. at 470. In the

Far more important, it specifically demands, as a part of an allegation of an unlawful refusal to deal or as a part of an allegation of unlawful attempted monopolization, uncontradicted evidence that the defendants did *not* have an "intention to enter the . . . banking market only by acquiring an existing as a subsidiary." (*Infra*, p. 31).

This declaration of the Court of Appeals could not more squarely contradict the statement of this Court that the fact that a potential entrant "had no intent to enter *de novo*, and would not have done so, does not *ipso facto* dispose of the potential competition issue." *United States v. Falstaff Brewing Corp.*, U.S. , 93 S.Ct. 1096, 1101 (1973). There, on those facts alone, the case was remanded to the district court for its determination of the facts as to whether the defendant was a potential competitor.

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instant case the director of the holding company withdrew his support after threats by its president; a purpose in withholding the loan was the holding company's interest in acquiring the Poudre itself.

Indeed, there is reason to believe that horizontal restraints such as those imposed by the joint refusal to deal in the instant case are invalid even when the ostensible purpose is to promote competition. *Cf. United States v. Topco Associates, Inc.*, 405 U.S. 1126 (1972); *United States v. General Motors, Inc.*, 384 U.S. 127 (1966).

Here the District Court and the Court of Appeals permitted summary judgment for Respondents. They did so without considering any number of ways by which the manner of Respondents' acquisition of the Poudre Bank affected the line of commerce.[9] It was never considered whether,[10] without undisputed issue of material fact, the existing business of Respondent United Bank of Denver and another subsidiary of its parent Holding Company had already made it an actual competitor — and not merely a potential competitor — in the Fort Collins market, so that its entry did restrain competition. The Court of Appeals never considered whether Respondents' refusal to make a loan to enable Petitioners Clark and Knoll to enter the market

[9] To reiterate, the Court of Appeals treated as finally determinative of an undisputed issue of fact an unreported decision of the Board of Governors of the Federal Reserve Board. There can of course be no res judicata effect, since Petitioners were not parties to that administrative proceeding. Morever, a dissenting opinion sets forth the very dangers complained of in Petitioners' amended complaint in the District Court. It thereby presents a disputed issue of fact.

[10] The factors mentioned do not appear to have been considered in *United States v. First Bancorporation*, 327 F. (D. Colo. 1972), affirmed without opinion by an equally divdied court U.S. , 93 S.Ct. 1434 (1973).

destroyed potential competition by Clark and Knoll. The Court of Appeals never considered whether Respondents might have lawfully entered the Fort Collins market by acquiring one of the two small banks there. Finally, after correctly determining from undisputed facts that Respondents' management never intended to enter the market *de novo*, it treated that issue as disposed of *ipso facto*, contra to the express rule of *Falstaff*, *supra*.

The Court of Appeals seems to have thought mistakenly that Petitioners' allegations of an unlawful concerted refusal to deal must turn upon a specific admission of an attempt to monopolize. But even after that, the manner in which it determined as a matter of law that no attempt to monopolize occurred either is so novel that it should be passed upon by this Court or else is in complete disregard of the existing decisions of this Court.

CONCLUSION

The decision of the Court of Appeals raises important questions concerning procedures for summary judgment and administration of the federal antitrust laws. Petitioners believe that its opinion is in error and in conflict with views expressed by this Court and by other courts of appeals.

Petitioners respectfully request that the petition for certiorari be granted.

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AUGUST, 1973

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2939

LARRY E. CLARK, ET AL.,
PLAINTIFFS
V.
UNITED BANK OF DENVER
NATIONAL ASSOCIATION, ET AL.,
DEFENDANTS.

Judgment and Order
FILED APRIL 5, 1972

THIS MATTER being heard upon the motion of defendants United Bank of Denver National Association and United Banks of Colorado, Inc. for summary judgment on all five claims of the complaint, and upon plaintiffs' motion for a partial summary judgment on the liability issue of the fifth claim and the Court having studied the briefs and heard oral argument,

Summary judgment is entered in favor of defendants, United Bank of Denver National Association and United Banks of Colorado, Inc., and against the plaintiffs on the first and fifth claims; and additionally, these claims are dismissed for failure to state a claim for relief.

On its own motion the Court orders that the second, third and fourth claims be dismissed for lack of pendente jurisdiction, because of the dismissal of claims one and five.

Plaintiffs' action is hereby dismissed.

Dated at Denver, Colorado, this 4th day of April, 1972.

FRED M. WINNER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May 1973, Term

No. 72-1047

LARRY E. CLARK AND
J. ELLIOTT KNOLL,
PLAINTIFFS-APPELLANTS,

V.

UNITED BANK OF DENVER NATIONAL ASSOCIATION, A NATIONAL BANKING ASSOCIATION, UNITED BANKS OF COLORADO, INC., A COLORADO CORPORATION AND NATIONAL BANK HOLDING COMPANY AND UNITED BANK OF FORT COLLINS NATIONAL ASSOCIATION, A NATIONAL BANKING ASSOCIATION,
DEFENDENTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(District Court No. 2939)
Filed May 22, 1973

Before *HILL*, *SETH* and *BARRETT*, United States Circuit Judges.

HILL, Circuit Judge.

Appellants Clark and Knoll appeal from an order granting defendants' motion for summary judgment entered by the United States District Court for the District of Colorado. Appellants assert error by the trial court on three grounds: They contend their action was properly brought on an allegation of fraud in connection with the purchase or sale of a security; that the complaint contained allegations that the denial of their loan was done in furtherance of appellees' intention to establish a monopoly, therefore the antitrust claims were properly stated; and, they challenge the use of summary judgement in an antitrust case.

Clark and Knoll became interested in acquiring The Poudre Valley National Bank (Poudre) in Fort Collins, Colorado. In search of financing with which to acquire approximately 81 percent of the capital stock of Poudre, appellants went to appellee United Bank of Denver National Association (United), a subsidiary of United Banks of Colorado, Inc. (Holding Company), a national bank holding company. The Holding Company had previously declined purchase of the stock in question due to doubts as to the approval of such acquisition by the Federal Reserve Board. Appellants' loan application was refused by United following a

period of negotiation. During the negotiation process, the Federal Reserve Board altered its policy, and it was eventually thought by the officers of the Holding Company that approval by the Federal Reserve Board could be obtained for its acquisition of the stock of Poudre. Negotiations by the Holding Company to acquire control of Poudre were initiated but were soon abandoned upon learning from the owner of the stock that other negotiations were being conducted for the stock. When these other negotiations terminated, the Holding Company was contacted by the owner and it ultimately purchased Poudre as another subsidiary. Roger Knight, Jr., is chairman of the board of United and president of the Holding Company. Norman Dean is a director of the Holding Company and an executive officer of another United Bank owned by the Holding Company. We have distinguished the roles of the Holding Company in the events preceding the filing of the complaint; however, in resolution of the issues raised in this appeal, we have considered the Holding Company and its wholly-owned subsidiary, United, as a single entity.

The basic premise of the action was that the Holding Company had negotiated for the purchase of Poudre while United was contemporaneously

negotiating with Clark and Knoll on their loan application to purchase the stock, without disclosing this fact to them. In addition to alleging breach of fiduiciary duties, fraud, unfair competition, and breach of warranty, the complaint also alleged fraud in violation of § 10 (b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78 (b), and Rule 10(b)-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. Clark and Knoll, in their complaint, also alleged violations of the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 2 and 18.

The Securities Exchange Act of 1934, § 10(b), makes unlawful the use of any manipulative or deceptive device or contrivance in connection with the purchase or sale of any registered security. Rule 10(b)-5 further delineates the proscribed offense.[1] Relying on the language contained in the statute, Clark and Knoll maintain that the loan which they sought from United was for the purpose of purchasing the Poudre stock; that it was fradulent for

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[1] 17 C.F.R. § 240.10b-5 provides: "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact

United to conceal or fail to disclose the Holding Company's interest in acquiring the Poudre stock while United was negotiating the loan with Clark and Knoll; and that therefore, within the broad terms of the statute, there was fraud in connection with the purchase or sale of a security.

In Knouff v. Utah Construction & Mining Co., 408 F.2d 958 (10th Cir. 1969), *cert. denied*, 398 U.S. 831, this Court stated at 961 that "[t]he words 'purchase or sale' must be defined broadly." We there held the term "purchase or sale" to "include the exchange of shares which occurs as the result of a merger." In that case we were aided by a tangible event involving the actual transfer of shares of stock. In this case there is no such tangible event. No stock was purchased or sold by Clark and Knoll. To construe loan negotiations for the purpose of purchasing stock to be "in connection with the purchase or sale of any security" would be an overly broad extension of that term. Therefore, we reject

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or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

the claimed application of the Securities Exchange Act to this transaction.

Appellants advance three arguments in support of the alleged antitrust violations. The first involves an allegation of tying associated with approval of the loan. During the loan negotiations, United received from Clark and Knoll an oral promise to maintain an interest-free deposit in United of at least $1,500,000 in the event the loan was made. In this manner United's position as correspondent bank would be established. Clark and Knoll contend this condition of the proposed loan agreement, that is to maintain the substantial interest-free deposit, is a tying arrangement and a *per se* violation of the Sherman Act. We are first confronted by the failure of the appellants to demonstrate the requisite market power over the tying product.[2] The Bank Holding Company Act Amendments of 1970, particularly § 106 (b), 12 U.S.C. § 1972, prohibits certain types of tying arrangements within the banking industry. The legislative history, however, indicates that the provision was not intended to interfere with the conduct of appropriate traditional banking practices. Included in these excepted banking practices

[2] Fortner Enterprises v. U.S. Steel Corp., 394 U.S. 495 (1969).

was the maintenance of traditional correspondent relationships. In light of this, we cannot conclude that such a requirement by United would be a *per se* violation as a prohibited tying arrangement. Also important in connection with this argument is the fact the complained about tying arrangement never became a part of a final agreement. It was only discussed and considered as a part of the negotiating process. In fact, in the extensive depositions the evidence is entirely lacking to show even that loan negotiations ever reached the point of a formal written application for a loan by appellants. Nor is there any evidence of an oral agreement between the parties concerning even any phase of a loan agreement. In fact, there were only conversations had between appellants and officers of Holding Company concerning the possibility of a loan.

The next argument advanced in support of the antitrust claims alleged in the amended complaint involves an alleged refusal to deal. Depositions which the trial court considered in making its decision clearly demonstrate that United had ample and valid reason to refuse the loan based on appellants' failure to obtain adequate financial resources and their lack of adequate managerial qualifications in the area of financial institutions. There is no-

thing in the record considered by the trial court which would indicate the refusal by United was prompted by any other reason. Also, we find no relevant evidence which might even indicate or infer United's denial of the loan was motivated by a desire on its part to further monopolize the relevant market.[3] Again, we find no evidence in the extensive depositions and record sufficient to even infer a monopoly position with regard to a loan of this amount, nor that in denying the loan United did so out of a desire to further monopolize the relevant market. Such a showing is prerequisite to an asserted refusal to deal claim.

The third antitrust claim advanced by appellants is that of attempt to monopolize. In this context they urge that United's Acquisition of Poudre would give it 35 percent of the total assets of the area. The relevant facts are that Fort Collins, Colorado, a city located about 65 miles north of Denver, was serviced by four banks. The largest bank was The First National Bank of Fort Collins which was owned by

[3] "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freeley to excercise his own independent discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300 (1919).

Western Bancorporation, Inc., a California-based holding company. In 1967 this bank held approximately 57 percent of the area's deposits. The Poudre bank was second largest, having approximately 35 percent of the area's deposits, and was owned by Flour Mills of America, Inc. prior to its acquisition by the Holding Company. The two smaller banks divided the remainder of the area's banking deposits substantially equally. The Holding Company of which United was a subsidiary did not at that time have any substantial banking contacts in Fort Collins. Its closest subsidiary bank was located at Greeley, Colorado, 30 miles southeast of Fort Collins.

Also in resolving this question the type of merger which would result from the acquisition of Poudre by the Holding Company has considerable imuortance. In United States v. First National Bank, 301 F. Supp. 1161 (S.D. Miss. 1969), five recognized types of mergers are defined and described. The fourth of these five types is "a 'geographic market extension merger' which is a merger between two firms that produce the same product line but do so in separate geographic markets and are not direct rivals." United States v. First National Bank, *supra* at 1190. In further describing this type of merger

the court stated, "The geographic market extension merger does not alter the number of competitors that are in the revelant market or their specific locations and the same number of banking alternatives exist after the merger as before. Therefore, the present restraint upon undue use of market power which exists in this market is going to continue to exist for some time after this proposed merger . . ." *Id.* The acquisition of Poudre by the Holding Company clearly would be within this definition and would be governed by antitrust factors relevant to this type of merger.

Market shares propounded by appellants are relevant only in horizontal mergers,[4] that is, "a merger between two firms who are in direct competition, that is, producing the same product lines and operating in the same geographic markets." United States v. First Nat'l Bank, *supra*. In a geographic market extension merger, our consideration of anti-

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[4] United States v. Phillipsburg Nat'l Bank, 399 U.S. 350 (1970); United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. First Nat'l Bank & Trust Co. 376 U.S. 665 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. Provident Nat'l Bank, 280 F.Supp. 1 (E.D.Pa. 1968); United States v. Manufacturers Hanover Trust Co., 240 F.Supp. 867 (S.D.N.Y. 1965).

competitive effect is limited "to an evaluation of whether it has the effect of removing a *potential market entrant* and to a consideration whether [the merging bank], which is not yet in the market, may still be a present competitive force, whereby its merger with a member of that market may eliminate competition in much the same way that a simple horizontal merger can."[5] United States v. First Natoinal Bancorporation, Inc., 329 F.Supp. 1003, 1011 (D.C.Colo. 1971), *aff'd per curiam* by an equally divided Court without opinion, U.S. (1973).

There appear to be three potential routes of influx into a geographic area by a potential market entrant bank or bank holding company: The first is to establish a bank *de novo*, that is, create a new bank as a subsidiary following approval by the regulatory agencies. The second method is to develop competition within a geographic area from a present banking location by building closer commercial relationships within that area. The third alternative

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[5] *See also* United States v. Falstaff Brewing Corp., U.S. (1973); United States v. Idaho First Nat'l Bank, 315 F.Supp. 261 (D.C.Idaho); United States v. First Nat'l Bank, 310 F.Supp. 157 (D.C.Md. 1970); United States v. First Nat'l Bank, 301 F.Supp. 1161 (S.D.Miss. 1969); United States v. Crocker-Anglo Nat'l Bank, 277 F.Supp. 133 (N.D.Cal. 1967).

available to the potential entrant is establishment of a branch bank. In a deposition exhibit, the Board of Governors of the Federal Reserve Board, in a statement as part of its order approving the Holding Company's acquisition of the Poudre stock, determined the banking needs of the community appeared to be adequately served by the four banks located there, and also that the development of closer commercial relationships between Fort Collins and Greeley, the site of the Holdng Company's closest subsidiary bank, appeared unlikely due to the existing highway structure in the intermediate area. The third potential route of influx, that of establishing a branch bank, is not available to appellees due to statutory prohibition.[6] In addition to these objective factors which make the Holding Company's influx into the Fort Collins area impractical, the internal documents of the Holding Company consistently show their intention to enter Fort Collins banking market only by acquiring an existing bank as a subsidiary.

Appellants lastly challenge the use of summary judgment in an action involving antitrust allegations. While it is true that summary judgment is not favored in antitrust cases,[7] we feel, in view of the

[6] *See* 12 U.S.C. § 36 (c); 1963 C.R.S. § 14-3-1.

extensive depositions and depositions exhibits available to the trial court,[8] that summary judgment was proper in this suitation.

In view of our disposition of this case, we make no determination of appellees' challenge that Clark and Knoll lack standing to assert a potential competition claim.

The trial courts's order of summary judgment and dismissal is AFFIRMED.

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[7] Semke v. Enid Automible Dealers Association, 456 F.2d 1361 (10th Cir. 1972); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967).

[8] Depositions available to the court included those of both Clark and Knoll, Roger D. Knight, Jr., Norman M. Dean, Kent Olin, a loan officer of United Bank of Denver, and Jack N. Greenman, the president of Flour Mills of America, Inc.

APPENDIX C

The relevant provisions of the Sherman Anti-Trust Act of 1890 (26 Stat. 209, as amended, 50 Stat. 282, 15 U.S.C. §§ 1 & 2 are:

§ 1. Trust, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, o rname of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Pro-*

vided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy delared by section 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by improsiment not exceeding one year, or by both said punishments, in the descrtion of the court.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a middemeanor, and, on conviction thereof, shall be

punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.